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No. 88-146

IN THE

Supreme Court of the United States

October Term 1988

MIGUEL MATOS,

Petitioner,

-against-

EUGENE S. LeFEVRE, Superintendent,
Clinton Correctional Facility,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner Miguel Matos seeks a writ of certiorari to review a May 24, 1988 judgment of the United States Court of Appeals for the Second Circuit. By that judgment, the Court of Appeals denied petitioner's motion for a

certificate of probable cause and dismissed his appeal from an October 30, 1987 order of the United States District Court for the Southern District of New York (Thomas P. Griesa, D. J.), which had denied petitioner's application for a writ of habeas corpus (A-1, A-51).*

In his habeas corpus petition, petitioner challenged his July 1, 1980 conviction in New York State Supreme Court, New York County (Edward Greenfield, J.), after a jury trial, of two counts of Murder in the Second Degree (New York Penal Law §125.25). Petitioner was sentenced to life imprisonment, and is presently incarcerated pursuant to his New York conviction.

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*Parenthetical references preceded by `A' and `B' are to petitioner's appendix and brief respectively.

STATEMENT OF THE CASE

On January 24, 1979, petitioner and his girlfriend, Christine Perdicaro, went to Charles Fashaw's apartment at 345 East 94th Street in Manhattan. Fashaw was a drug dealer who had supplied petitioner with drugs. Petitioner shot and killed Fashaw with a pistol, and then shot and killed Fashaw's girlfriend, Karen Guy.

Acting primarily on information provided by two informants, police officers entered petitioner's Manhattan apartment on March 12, 1979, and arrested petitioner and Perdicaro. The officers had not obtained a warrant before entering the apartment. As Perdicaro was being driven to the precinct, she told the officers that Fashaw had raped her before the shooting. At the precinct, petitioner received Miranda warnings and

waived his rights. After the police informed him of Perdicaro's statements, he admitted that he had killed Fashaw and Guy to avenge the alleged rape. On March 15, 1979, petitioner was charged with two counts of Murder in the Second Degree (New York County Indictment No. 1115/79).

Petitioner moved to suppress his statements at the precinct, alleging that they were fruits of an arrest without probable cause. A hearing commenced on January 8, 1980, before Justice Edward Greenfield. During the hearing, the court examined the two informants and an investigator from the Nassau County District Attorney's office in camera on the issue of probable cause.

On February 5, 1980, Justice Greenfield denied petitioner's motion, holding that the police had probable cause to arrest him, and that his

statements had been voluntary. Petitioner had not argued that the police had improperly entered his home without a warrant, since the controlling New York decision on that issue, People v. Payton, 45 N.Y.2d 300 1978, allowed such warrantless entries by the police. However, on April 15, 1980, the United States Supreme Court reversed Payton and held that the police must obtain warrants to make routine arrests of felony suspects in their homes. Payton v. New York, 445 U.S. 573 1980. Justice Greenfield sua sponte reconsidered his ruling, and on May 9, 1980, ruled that the Payton decision had no retroactive application to petitioner's arrest, and reaffirmed his order denying petitioner's motion to suppress his statements. On June 21, 1982, this Court held that Payton v. New York was retroactive to all

convictions not yet final at the time of that decision. United States v. Johnson, 457 U.S. 537 (1982).

On May 19, 1980, petitioner was convicted on both counts of second-degree murder, and on July 1, 1980, he was sentenced to concurrent prison terms of from twenty and twenty-five years to life. Petitioner appealed, and on April 21, 1983, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed petitioner's conviction. The Appellate Division held that although there had been a Payton violation, suppression of petitioner's statements was not required because the taint had been attenuated by petitioner's receipt of Miranda warnings and his learning of Perdicaro's statements (A-52-57). 93 A.D.2d 772. Leave to appeal to

the New York Court of Appeals was denied on June 17, 1983. 59 N.Y.2d 975.

In his petition for a writ of habeas corpus, petitioner advanced three arguments in support of his claim that his federal constitutional rights had been violated. First, petitioner asserted that his warrantless arrest had been illegal, and that nothing after his arrest attenuated the taint attaching to his statements. Second, he contended that Justice Greenfield had violated his Sixth Amendment rights by taking testimony in camera during the suppression hearing. Finally, petitioner claimed that the trial judge had deprived him of a fair trial by, inter alia, the manner in which he questioned a defense witness.

In a report and recommendation to the District Court, United States

Magistrate Sharon E. Grubin rejected petitioner's first claim as barred from federal judicial review by Stone v. Powell, 428 U.S. 465 1976, because the State of New York had afforded petitioner an opportunity for full and fair litigation of that claim (A-21-32). Magistrate Grubin rejected petitioner's second claim because it challenged the hearing court's refusal to disclose the identities of the informants and to permit petitioner to participate in the in camera questioning, an issue not cognizable on a federal habeas corpus petition. The magistrate also noted that the issue, in any event, was not the legality of petitioner's arrest, which was concededly illegal under Payton v. New York, but attenuation of the taint (A-32-35). Finally, Magistrate Grubin reviewed each of petitioner's

attacks on Justice Greenfield's conduct of the trial and found no merit to any of these claims (A-35-48). The magistrate recommended that the petition be dismissed as to petitioner's first two claims and denied as to the third (A-49).

On October 30, 1987, Judge Griesa approved and adopted Magistrate Grubin's report and recommendation, and dismissed petitioner's application (A-51). On May 24, 1988, the Second Circuit denied petitioner's application for a certificate of probable cause and dismissed his appeal (A-1-2).

THE PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks certiorari to review two contentions: that the record does not support a finding of attenuation between his illegal arrest and his stationhouse statements, and that Stone

v. Powell, 428 U.S. 465 (1976), does not bar federal habeas corpus review of this claim. Petitioner does not press the Sixth Amendment and fair trial claims raised in his habeas corpus petition.

REASONS FOR DENYING THE WRIT

1. As a general rule, certiorari is granted only when there are special and important reasons for granting it, for example, in cases of conflict among decisions of the lower courts or when the lower courts have decided important questions of federal law which have not been, but should be, settled by this Court. See Rules of the Supreme Court of the United States, Rule 17 (1988). The purposes of certiorari are not served by review in this Court of decisions which involve no conflict among the lower courts, and which present no novel or unresolved issues of law, but

turn instead on the application of established principle to particular factual situations. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In his petition for a writ of certiorari, petitioner claims that Stone v. Powell, 428 U.S. 465 (1976), does not preclude him from raising in a federal habeas corpus proceeding his objection to the admission of his precinct statements (B8-9). However, petitioner's claim arises under the Fourth Amendment, and it is well settled among the federal circuits both that Stone v. Powell bars federal habeas corpus review of Fourth Amendment claims generally, provided that the petitioner has had the opportunity to

litigate them in the state courts,* and more particularly, that this rule bars review of the question whether intervening events have so attenuated the taint resulting from a Fourth Amendment violation as to remove any basis for excluding the petitioner's later-obtained voluntary statements.** Petitioner

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*See, e.g, United States v. Brown, 663 F.2d 229, 234 (D.C. Cir. 1981); Neron v. Tierney, 841 F.2d 1197, 1199 (1st Cir. 1988); Jackson v. Scully, 781 F.2d 291, 297 (2nd Cir. 1986); Gilmore v. Marks, 799 F.2d 51, 54 (3rd Cir. 1986); Griffen v. Aiken, 775 F.2d 1226, 1234 (4th Cir. 1985); Penry v. Lynaugh, 832 F.2d 915, 918 (5th Cir. 1987); Jennings v. Rees, 800 F.2d 72, 75 (6th Cir. 1986); Willard v. Pearson, 823 F.2d 1141, 1149 (7th Cir. 1987); Clark v. Wood, 823 F.2d 1241, 1250 (8th Cir. 1987); Knaubert v. Goldsmith, 791 F.2d 722, 725 (9th Cir. 1986); Yanez v. Romero, 619 F.2d 851, 853 (10th Cir. 1980); Agee v. White, 809 F.2d 1487, 1490 (11th Cir. 1987).

**Cardwell v. Taylor, 461 U.S. 571 (1983); Jones v. Superintendent of Rahway State Prison, 725 F.2d 40, 42 (3rd Cir. 1984); Willard v. Pearson, 823 F.2d 1141, 1149 (7th Cir. 1987); Agee v. White, 809 F.2d 1487, 1490 (11th Cir. 1987); United States ex rel. Mark v. Chrans, 670

submits no acceptable reason for reconsidering these well-settled principles. On the contrary, his petition involves nothing more than the application of these principles to the particular facts of this case, and petitioner in fact is asking this Court to review his claims simply in order to achieve a different result. Such a request is not a valid basis for granting a writ of certiorari.

Petitioner also contends that the record does not support the hearing judge's finding of attenuation between his illegal arrest and those statements (id.). But obviously, this contention may not be reviewed in light of Stone v.

F.Supp. 1401, 1403 (N.D. Ill. 1987); Allen v. Dutton, 630 F.Supp. 379, 385 (M.D. Tenn. 1984) aff'd, 785 F.2d 307 (M.D. Tenn. 1986); Woodard v. Sargent, 567 F.Supp. 1548, 1551 (E.D. Ark. 1983), rev'd on other grounds, 753 F.2d 694 (8th Cir), cert. denied, 474 U.S. 1013 (1985).

Powell (see pages 14-18 below); and here, too, in any event, petitioner adduces no more persuasive basis for certiorari than his desire to overturn the result below. This Court should reject petitioner's invitation to parse the record once again and duplicate the work of the New York courts and the federal courts below.

2. Even should this Court not be persuaded by these considerations, the writ should still be denied, because no different result could be justified on the record before the Court. The District Court's application of Stone v. Powell was dictated by the reasoning of that case, that a state prisoner may not be granted federal habeas corpus relief on the ground that evidence seized in violation of the Fourth Amendment has been admitted at his trial provided the state has given him an opportunity for

full and fair litigation of his Fourth Amendment claim. 428 U.S. at 494. That reasoning applies squarely to this case, as is clear from Cardwell v. Taylor, supra, and petitioner's assertion that Stone v. Powell does not apply to Fourth Amendment claims involving oral confessions cannot be honored short of overruling Stone v. Powell and Cardwell v. Taylor themselves.

Petitioner is mistaken in suggesting that Chief Justice Burger's concurring opinion in Stone v. Powell indicates that the rule of that case is limited "to tangible physical evidence, like drugs or weapons, rather than confessions" (B13). This suggestion is apparently based on the following statement in Chief Justice Burger's concurrence:

> If a suspect's will has been overborne, a cloud hangs over

> his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability. That is not the case as to reliable evidence -- a pistol, a packet of heroin, counterfeit money, or the body of a murder victim -- which may be judicially declared to be the result of an "unreasonable" search. The reliability of such evidence is beyond question; its probative value is certain. 428 U.S. at 496-97.

But petitioner misreads these words: the Chief Justice did not suggest that Stone v. Powell applies only to physical evidence, but merely contrasted the Fourth Amendment exclusionary rule with the Fifth Amendment's protection against compelled self-incrimination. Of course, even if petitioner's construction of the quoted passage were correct, it could not represent the law, since this Court has ruled in Cardwell v. Taylor, supra, that the Stone v. Powell bar extends to oral confessions.

Petitioner is also wrong in contending that the congressional grant of subject-matter jurisdiction, 28 U.S.C. §§1331, 1346(a)(2) and 2254(a), precludes federal district courts from refusing to entertain a Fourth Amendment claim (B13-14). This argument was squarely rejected by the majority in Stone v. Powell, who stated emphatically, "Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." 428 U.S. at 495 n. 37. This Court held that federal courts need not apply the exclusionary rule on habeas review of Fourth Amendment claims unless the state prisoner was denied the opportunity for full and fair litigation in the state courts, but the Court made clear that this holding "does not mean that the federal court lacks jurisdiction

over such a claim, but only that the application of the [exclusionary] rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation." Stone v. Powell, 428 U.S. at 494-95, n. 37.

In other words, Stone v. Powell did not limit the federal court's jurisdiction over Fourth Amendment claims, but simply refused to extend the judge-made exclusionary rule to such claims when they are raised in a habeas corpus petition, because the justification for the exclusionary rule "becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review." 428 U.S. at 486. Petitioner has never

alleged that he was denied the opportunity by the New York courts for full and fair consideration of his claim that his statements were tainted by his illegal arrest, and that claim is therefore barred from federal habeas review.

3. In any event, the record overwhelmingly supports the Appellate Division's finding that petitioner's unlawful arrest did not taint his later statements at the stationhouse. Under traditional standards, a precondition for finding attenuation of a Fourth Amendment violation alleged to precede an incriminating statement is that the statement was made after proper Miranda warnings and was voluntary under the Fifth Amendment. Once that condition is satisfied, such factors as the "temporal proximity of the arrest and the

confession, the presence of intervening circumstances ... and, particularly, the purpose and flagrancy of the official misconduct" may all serve to demonstrate that the statement is "sufficiently an act of free will to purge the primary taint." Brown v. Illinois, 422 U.S. 590, 603-04 (1975); Wong Sun v. United States, 371 U.S. 471, 486 (1963).

In petitioner's case, as the state courts found, the precondition for attenuation was satisfied, because petitioner did receive Miranda warnings and his statements were in fact voluntary (A-56). Moreover, all three factors discussed in Brown v. Illinois, supra, indicate that petitioner's statements were not tainted by the Payton violation. First, the time between petitioner's warrantless arrest at his home and his first statement to the police was about

one and one-half hours, sufficient to establish a definite chronological break between the arrest and the interrogation. In any event, the length of detention is an ambiguous factor, since "a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one." Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J., concurring). What is significant here is that the one and one-half hours passed without any questioning. Cf. Taylor v. Alabama, 457 U.S. 687, 691 (1982) (six hours elapsed, but prosecution failed to show how much of this time was spent in interrogation). And there is no indication that the circumstances of petitioner's detention were in any respect severe, or that the stationhouse atmosphere was specially coercive, beyond the coercion inherent in

any police custody. Cf. Rawlings v. Kentucky, 448 U.S. 98, 107-08 (1980) (congenial detention atmosphere more significant than brief time period between illegal arrest and suspect's admissions).

Second, a significant intervening event occurred between petitioner's arrest and his statement: Christine Perdicaro implicated petitioner while she was being driven to the stationhouse, and petitioner learned of at least part of Perdicaro's statement when the police informed him that Perdicaro had told them about the rape which could have given petitioner a motive for killing Fashaw. It is certainly fair to infer that it was this information, with its obvious implication that Perdicaro was willing to cooperate with the police, which prompted

petitioner to speak, rather than any exploitation by the police of the Payton illegality.

Third, there was no flagrant police conduct in petitioner's case, and this factor appears to be the most important. See Brown v. Illinois, 422 U.S. at 609-12 (Powell, J., concurring); Dunaway v. New York, 442 U.S. at 226-27 (Rehnquist, J., dissenting); see also People v. Martinez, 37 N.Y.2d 662, 668-70 1975. When the police arrested petitioner, they had probable cause and they were relying upon a New York statute, Criminal Procedure Law Section 140.15, that authorized arrests without a warrant inside a suspect's home. That statute had been upheld by the New York Court of Appeals over a claim that it conflicted with the Fourth Amendment. People v. Payton, 45 N.Y.2d 300 (1978).

Therefore, the police proceeded with absolute good faith in believing they could properly enter petitioner's apartment without a warrant. See People v. Martinez, 37 N.Y.2d at 668. Further, the police did not attempt to gather evidence inside petitioner's apartment and did not try to obtain his statement there. And there is no showing that petitioner was intimidated, provoked, or at all mistreated inside his apartment, or for that matter elsewhere, in order to overcome a reluctance to speak to the officers. See People v. Rogers, 52 N.Y.2d 527, 534 (1981); cf. Brown v. Illinois, 422 U.S. at 605 (police engaged in flagrant misconduct to provoke statement).

In light of all these circumstances, the New York courts correctly found that the warrantless

arrest in petitioner's apartment did not taint his subsequent statements, and that no legitimate deterrent purpose would be served by suppressing petitioner's statements.

CONCLUSION

The instant petition should be denied.

Respectfully submitted,

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September 21, 1988